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No. 90-1425

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE STATE OF TEXAS, *Petitioner*

*vs.*

CRAIG WILLIAM REEVES, *Respondent*

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

## Petitioner's Reply to the Brief in Opposition

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The intermediate Texas appellate court concluded that Respondent's conviction was supported by sufficient evidence *as measured against the instructions actually given to the jury.* The Court of Criminal Appeals, however, determined that those instructions improperly allowed a conviction on a theory broader than that encompassed by the indictment. Rather than requiring a new trial due to this instructional error, the Court of Criminal Appeals awarded an acquittal because the evidence was insufficient *as measured against the narrower instructions which should have been given.*

The State petitioned for a writ of certiorari, believing that the decision below involved a serious misinterpretation of *Jackson v. Virginia* and *Greene v. Massey.*[1]

[1] *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

Respondent suggests that the State is asking this Court to render an advisory opinion. He claims that the Court of Criminal Appeals determined that the evidence was insufficient under any theory, whether the *Jackson v. Virginia* test is applied to the instructions actually given or to the "proper instructions" which should have been given. Therefore, says Respondent, any decision by this Court would not change the result and would be advisory only. Brief in opposition at 8-9.

If it were true that the Court of Criminal Appeals had judged sufficiency in light of the instructions actually given, Respondent's position would have considerable merit. However, the Texas court never weighed sufficiency against the actual instructions; it simply weighed sufficiency under two variations of its "proper instruction" interpretation of *Jackson v. Virginia*.

As noted at pages six and seven of the petition, the Court of Criminal Appeals held that although the jury instructions allowed the State to rely on the weight of adulterants and dilutants in establishing the amount of controlled substance delivered, the State should have been required under the indictment to prove that Respondent delivered a *pure* amount of amphetamine over 28 grams. The court concluded that sufficiency under *Jackson v. Virginia* should be measured against that requirement since a "correct charge" to the jury would have demanded a determination of the pure weight of the substance. See appendix to the petition at A-6. The court then found inadequate proof of an unadulterated quantity of amphetamine in excess of 28 grams.

The Court of Criminal Appeals went on to acknowledge (but not to adopt) the State's argument that sufficiency should instead be measured against the instructions actually given to the jury. As Respondent notes, the court did remark that the evidence was insufficient "[u]nder either theory of culpability." See appendix to the petition at A-7.

**However, the court never actually weighed sufficiency against the plain meaning of the instructions given to the jury. Instead, the court's alternative analysis required the State to satisfy a restrictive interpretation of statutory terms in the jury charge, even though that definition of the terms had not been given to the jury and indeed had not even been announced by the appellate courts at the time of Respondent's trial.**

The jury had been instructed that "[t]he weight of the amphetamine is determined by its aggregate weight including any adulterants and dilutants, if any." See appendix to the petition at A-7,18. As the State noted in the petition, the jury could reasonably have understood this instruction to mean that Respondent was responsible for the total weight of the substance he delivered, including impurities of any sort. Petition at 18, n.8. The prosecutor had so argued to the jury without objection (see appendix to the petition at A-19), and the intermediate appellate court summarily ruled the evidence sufficient under those instructions. See appendix to the petition at A-12-14.

In purporting to find that the evidence was insufficient even under the actual instructions, the Court of Criminal Appeals clearly held the State to proof of a technical def-

inition of *adulterants and dilutants* (materials intentionally added to increase the bulk or weight of the final product) first announced in *McGlothlin v. State*, 749 S.W.2d 856, 859-61 (Tex. Crim. App. 1988). See appendix to the petition at A-5,10. However, Respondent's jury was not given that definition to guide its deliberations; *McGlothlin* was not even decided until over a year after Respondent's 1987 trial.[2]

Thus, whatever it purported to do, the Court of Criminal Appeals did not weigh sufficiency in light of the instructions as the jury could actually have understood them. It merely judged sufficiency under a variation of its "correct instruction" interpretation of *Jackson v. Virginia's* rational fact-finder test. Since the court below has never undertaken a proper constitutional analysis of the sufficiency of the evidence, Petitioner is not seeking an advisory opinion. Moreover, whether the Court of Criminal Appeals correctly decided how to apply *Jackson v. Virginia* to a case submitted under flawed jury instructions is clearly a federal question.

Petitioner again asks that a writ of certiorari issue to review the decision below.

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[2]In its motion for rehearing, the State vigorously challenged the retroactive application of the *McGlothlin* definition to the *Jackson v. Virginia* sufficiency review (see appendix to petition at A-16-17), but to no avail.

Respectfully submitted,

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